IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1147 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

IQBAL AHMED MOHMAD HASAN MOMIN

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1147 of 1995

MR BS SUPEHIA for Petitioner No. 1

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE K.R.VYAS
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 29/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE K.R.VYAS)

1. The appellant by this appeal has challenged the judgment and order of conviction and sentence dated 25th July, 1995 passed in Sessions Case No. 100/1993 by the Ld. Addl. Sessions Judge, Surat convicting him for the offences punishable under Sections 8 (C) and 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'NDPS Act') and sentenced him to suffer RI for 10 years and to pay fine of Rs.1,00,000/-, in default to undergo simple imprisonment for one year.

2. P.S.I. Mr. Mahmedkha Ahmedkha Baloch, P.W. 5 Exh.13 is the complainant, who has filed complaint at Exh.14. It is alleged against appellant that on 20/2/1993 at about 0.15 hours the complainant with other police officers were on patrolling duty in Athwa Police Station area. The appellant was found near public urinal in a suspicious condition. After searching his person, a small packet was recovered from the pocket of the shirt. After opening the same there were severe smaller packets each containing tablets of Charas weighing 10 grams. The same were seized under panchnama and the appellant was arrested for possessing illegal Charas without pass or permit. Exh. 15 is the report submitted by the Assistant Director, Forensic Science Laboratory, Ahmedabad, wherein he has opined that the brownish black material weighing 8.530 grams seized from the appellant is found to be Charas. Exh. 16 is also a report of botanical tests of the substance carried out by Forensic Science Laboratory. It also confirms that the material sent by Athwa Line Police Station contained botanical material of cannabis sativa (Charas).

3. In order to bring home the charge levelled against the appellant the prosecution has mainly relied upon the evidence of complainant Mahmedkha Baloch P.W.5 Exh.13, the then Police Inspector Harkishan Pritamdas P.W.1 Exh.6 and Chhotubhai Bhanabhai Patel P.W. 4 Exh.10. Two panchas examined in the present case, namely Saiyed Nasruddin Sirajuddin, P.W.2 Exh.7 and Mahmed Rafik Abdul Karim P.W.3 Exh.8 were declared hostile.

4. The Ld. Addl. Sessions Judge, Surat, who tried the case, at the end of the trial, found that the prosecution has successfully established the case against the appellant. He, therefore, convicted the appellant and imposed punishment as stated hereinabove.

5. Learned counsel Mr. Supehia appearing for the appellant submitted that the prosecution in the instant

case has not followed the mandatory requirement of sections 43 and 50 of the NDPS Act in as much as neither the wish of the appellant was ascertained u/S. 50 of the NDPS Act nor search was carried out in presence of the Gazetted Officer or the Magistrate and, therefore, the order of conviction and sentence is bad and unsustainable in law. To substantiate his argument, reliance is placed on certain authorities. We will refer to them at an appropriate stage. Mr. H.H. Patel, Ld. APP on the other hand supported the judgment of the trial Court in toto.

6. P.S.I. Mr. Baloch is the complainant in the instant case. According to him on 20/2/1993 he was serving as P.S.I. in Athwa Line Police Station, Surat. At about 0.15 hours he in the company of Police Inspector Shri Sharma and other staff members had gone for night patrolling. At about 0.30 hours they saw appellant in suspicion condition near public urinal at Bhagol Cotsfil road. On being interrogated, he has given his name as Iqbal Ahmed Mohmed Hasan Momin of Surat city and has further informed that he is having tablets of Charas. The complainant thereafter informed S.P. Shri Patel by wireless. Shri Patel immediately reached the spot and he was told the facts. The Panchas were thereafter called and panchnama was prepared. Thereafter search of the person of appellant was carried out and one packet containing small 7 packets having Charas tablets, from the pocket of the shirt of the appellant was found. They were seized under panchnama. After applying seal, necessary panchnama was prepared which was signed by the P.S.I. Shri Sharma and S.P. Shri Patel. The appellant was arrested and thereafter the complaint exh. 14 was filed. The Muddamal article was thereafter sent to Forensic Science Laboratory, Ahmedabad. On receiving the report from the Forensic Science Laboratory, charge-sheet was filed against the appellant. Complainant is cross-examined at length. In the cross-examination the complainant has denied the suggestion that the search was carried out before calling the panchas and thereafter the panchnama was prepared. He has also denied the suggestion that the panchas were called at the police station on the next day and thereafter their signatures were obtained. Mr. Harkishan Pritamdas Sharma P.W.1 Exh.6 as well as the Police Inspector as well as Chhotubhai Patel - S.P. P.W.4 Exh.10 have supported the complainant and, therefore, it is not necessary to narrate their evidence. Reading the evidence of the prosecution witnesses, it is clear that the police party who were on patrolling duty had no prior intimation about the appellant carrying or possessing Charas with him.

The appellant was seen in a suspicious condition near public urinal and on being interrogated, he informed the patrolling party that he was having the tablets of Charas. Thereafter the superior officer, namely Superintendent of Police was informed and called and thereafter the search was carried out in presence of panchas and the narcotic drug was seized. Reading the entire evidence it is clear that the complainant and the other police officers have not followed the procedure which is required to be followed. Admittedly in the instant case the appellant was found in a suspicious condition near public place and the Charas was seized from him and he was arrested. When he was arrested from the public place, the procedure contemplated in section 43 of the NDPS Act was required to be followed. Section 43 provides for power of seizure and arrest in public places. It authorises officer of any of the departments mentioned in section 42 to seize in any public place or in transit, any narcotic drug or psychotropic substance in respect of which he has reason to believe an offence punishable under Chapter IV has been committed. ..... to detain and search any person whom he has reason to believe to have committed an offence punishable under Chapter IV, and if such person has any narcotic drug or psychotropic substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.

Section 50 of the NDPS Act provides conditions under which search of person shall be conducted. Section 50 reads as under :-

"50. Conditions under which search of persons shall be conducted.- (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).

(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone

excepting a female."

7. Conjoint reading of section 43 and section 50 of the NDPS Act makes it clear that before effecting any search of any person, the concerned authorised officer is required to take such person to the gazetted officer or to any nearest Magistrate without unnecessary delay. By necessary implications the search is required to be carried out in presence of the gazetted officer or the nearest Magistrate. The concerned authorised officer is under an obligation to inform the concerned person to exercise the option. This is the minimum the concerned authorised officer is required to do under these provisions. In other words, before giving such option to the concerned person, the concerned empowered officer is not authorised to effect search and seize the narcotic drug or psychotropic substance. The Supreme Court in the case of State of Punjab v/s. Balbir Singh (1994) 3 S.C.C. 299 considered several provisions of the NDPS Act regarding arrest, search and seizure and in particular the provisions of Sections 41, 42, 43, 44, 49, 50, 51, 52 and 57 of the NDPS Act as well as the provisions of the Code of Criminal Procedure relating to search and seizure effected during the investigation of a criminal case. Dealing with Section 50 it was held that in the context in which the right had been conferred, it must naturally be presumed that it is imperative on the part of the officer to inform the person to be searched of his right that if he so requires he shall be searched before a gazetted officer or a Magistrate and on such request being made by him, to be taken before the gazetted officer or Magistrate for further proceedings. The reasoning given in the said decision of Balbir Singh (supra) was that to afford an opportunity to the person to be searched "if he so requires to be searched before a gazetted officer or Magistrate", he must be aware of that right and that could be done only by the empowered officer by informing him the existence of his right. Failure to inform the person and failure to take him to the gazetted officer or the Magistrate on the part of authorised officer would mean noncompliance with the provisions of Section 50, which in turn would affect the prosecution case and vitiate the trial. In our opinion, the ratio laid down in Balbir Singh's case (supra) is clearly applicable to the facts of the present case. Reading the entire evidence consisting of the police officers, it is clear that no opportunity to the appellant to be searched before a gazetted officer or a Magistrate was given to him nor he was made to aware of that right and, therefore, prosecution in the instant case, in our opinion, has not complied with the

provisions of Section 50, which in turn would affect the prosecution case and vitiate the trial. The Ld. trial Judge in the instant case unfortunately misread the conclusions arrived at in the Balbir Singh's case (supra). The Supreme Court has in para. 25 of Balbir Singh's case set out conclusions. The first conclusion which is relevant for our purpose reads as under :-

> "(1) If a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrests a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of Cr.PC and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted and the question of complying with the requirements thereunder would not arise. (The Ld. trial Judge in the instant case has reproduced only this part of the conclusion in his judgment). If during such search or arrest there is a chance of recovery of any narcotic drug or psychotropic substance then the police officer, who is not empowered, should inform the empowered officer who should thereafter proceed in accordance with the provisions of the NDPS Act. If he happens to be an empowered officer also, then from that stage onwards, he should carry out the investigation in accordance with the other provisions of the NDPS Act."

Reading the entire para. it is clear that if a police officer without any prior information as contemplated under the provisions of the NDPS Act makes a search or arrest a person in the normal course of investigation into an offence or suspected offences as provided under the provisions of the Code of Criminal Procedure and when such search is completed at that stage Section 50 of the NDPS Act would not be attracted. In the instant case, as per the evidence of the complainant, the appellant was caught when he was found in a suspicious condition and on making interrogation he informed the police that he is having Charas tablets. Thereafter superior officer was immediately called and search was carried out. Thus, the concerned officer in the instant case is already having information that the appellant is carrying the narcotic drug and he is also having reason to believe that an offence punishable under Chapter IV has been committed; in that event he is expected to follow the provisions of section 50, namely that the appellant is having an option that the search is

to be carried out in presence of the gazetted officer or a Magistrate as held in Balbir Singh's case (supra) by the Supreme Court. Thus, the Ld. trial Judge having misread the law laid down by the Apex Court in the case of Balbir Singh's case (supra) and committed error in convicting the appellant.

8. The above discussions would lead us to the conclusion that the prosecution in the instant case has not followed the mandatory requirement of Section 50 of the NDPS Act, rendering the trial against the appellant as illegal and bad in law. We, therefore, allow the appeal. The judgment and order of conviction and sentence dated 25th July, 1995 in Sessions Case No. 100/1993 passed by the Ld. Addl. Sessions Judge, Surat is quashed and set aside. The respondent is directed to release the appellant forthwith, if not required for any other offence.

[K.R. VYAS, J.]

[AKSHYA H.MEHTA, J.]

* Pansala.